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No. 00-1421

Supreme Court, U.S.
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In The

Supreme Court of the United States

ELIZABETH PHELAN,

Petitioner,

v.

THE LARAMIE COUNTY COMMUNITY COLLEGE DISTRICT BOARD OF TRUSTEES, DOCTOR CHARLES BOHLEN, CHERYL W. PORTER, JOHN R. KAISER, LARRY ATWELL, DONALD J. BROWN, TOM BAUMAN, and JEAN VONDRAK BROWN, in their individual capacities,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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PETITIONER'S REPLY TO RESPONDENTS' REASONS FOR DENYING THE WRIT.

Respondents argue that the Tenth Circuit's decision was correct when it said that the Board's censure did not abridge free speech because it "did not punish" Mrs. Phelan for exercising her free speech, nor did it deter future protected speech. However, a reading of the principle cases relied upon by the Tenth Circuit shows that the lower court extended this Court's decisions in *Laird v. Tatum*, 408 U.S. 1 (1973), and *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964), far beyond the specific holdings of those cases, allowing protected speech to be punished in the interest of maintaining the appearance of political unity. This Court should grant certiorari to close this gaping loophole in First Amendment jurisprudence.

In determining whether the respondent's public censure for unethical conduct constituted sufficient punishment to trigger First Amendment scrutiny, the Tenth Circuit interpreted the holding in *Laird, supra,* to mean that, in light of *New York Times Co., supra,* there must be some imposition of "specific collateral injury" beyond a public censure before free speech was infringed. *Phelan v. Laramie County Community College*, 235 F.3d 1243, 1248 (2000). Though the *Laird* case did not involve a written code of conduct which, as applied, prohibited an elected official from expressing protected political speech, the Tenth Circuit read the language and cases cited in *Laird* to mean that there must be a compulsory government regulation or proscription which threatens "specific collateral injury," beyond being "censured" for ethical lapse before

First Amendment scrutiny is triggered since, under *New York Times Co. v. Sullivan, supra,* damage to reputation is to be tolerated by a public official. *Phelan, supra,* p. 1248. This is an extrapolated interpretation of *Laird* and *New York Times Co.* which operates to allow a code of ethics to regulate and suppress protected speech and demonstrates the reason why this Court should grant the Petition for Certiorari. To clarify whether a code of ethics, enforced through public censure, may be used to suppress protected political speech, this Court should issue a Writ of Certiorari to the Tenth Circuit Court of Appeals.

THIS COURT SHOULD CONSIDER WHETHER THE LOWER COURT PROPERLY EXTENDED *LAIRD* AND *NEW YORK TIMES CO.* TO APPROVE THE USE OF A CODE OF ETHICS TO REGULATE PROTECTED SPEECH.

The lower court's decision interprets the holding in *Laird* and *New York Times Co., supra,* to mean that unless a government sanction carries a specific collateral injury, such as loss of a job or profession, a punishment for exercising free speech does not infringe free speech. *Phelan, supra,* p. 1248. This interpretation does not square with the facts and holding in *Laird,* nor does it conform to the actual record in this case which demonstrates respondents' clear intent to suppress and deter political dissent through imposition of public censure.

At the outset, the facts in *Laird* are not remotely similar to the facts in *Phelan*. The *Laird* case dealt with a Department of Army surveillance program instituted to

obtain information on civil disturbances to aid in its role in quelling insurrection. *Laird, supra,* 408 U.S. at 2-5. This Court held in *Laird* that such a program did not chill the exercise of free speech by its mere existence. Since nothing in the existence of the intelligence gathering program carried any specific, present, objective harm, or threat of specific future harm, a federal court could not exercise its jurisdiction to regulate the activities of the Army since the surveillance program did not have regulatory, prescriptive or compulsory characteristics. *Laird, supra,* 408 U.S. at 13-15.

In contrast to the facts in *Laird,* in this case there is a regulatory Code of Ethics which, as applied, prohibits an elected member of a governing board of trustees from expressing political views contrary to the majority under pain of public "censure" for conduct contrary to the Code of Ethics. Thus, existence of a regulatory, prescriptive and compulsory governmental code of conduct, absent in *Laird,* is clearly present here.

Also, in stark contrast to *Laird,* in this case there was a specific direct injury imposed as a result of petitioner's speech. Though the Board's punitive sanction for violation of the Code did not contemplate loss or denial of employment or professional licensure, the sanction of public censure nonetheless was real, specific and harmful and should trigger First Amendment scrutiny. It is clear that a statement designated a "censure" is, *per se,* a punishment. An older edition of *Black's Law Dictionary* defined "censure" to mean, "A spiritual punishment." *Black's Law Dictionary,* Revised Fourth Edition (1968). The current edition defines the noun "censure" to be, "An official reprimand or condemnation; harsh criticism;" and

the verb "censure" as, "To reprimand; criticize harshly." *Black's Law Dictionary*, Seventh Edition (1999). Indeed, censure has long been deemed appropriate punishment of an elected official for ethical lapse.[1] Both the United States Senate and the United States House of Representatives specify "censure" to be potential punishment, just short of expulsion, for violation of the codes of conduct established by each chamber. (See S. Res. 338, 88th Cong., 2d Session (1964) as amended, Section 2(a)(2)(B)(i); and Rule 25(e)(2) of the *Rules of the Committee on Standards of Official Conduct*, adopted under authority of clause 2(a)(i) of Rule XI of the *Rules of the House of Representatives*, 107th Congress, March 14, 2001).

Words calculated to impose stigma upon a person's reputation for lapse in moral conduct have always been deemed harmful without proof of special harm. See 50 Am.Jur.2d, *Libel and Slander*, § 137, pp. 431-432. Even under *New York Times Co. v. Sullivan*, a sanction which imposes public censure calculated to label a public official as having want of integrity in discharge of duties of office, is no less a "specific collateral injury," deemed by the Court of Appeals to be absent in this case, than were the terminations or denials of employment or professional licensure set forth in *Laird* as examples of where individuals were subject to governmental regulation, proscriptions or compulsions which give rise to jurisdictional

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[1] Senator Joe McCarthy was "censured" in 1954. *Report of the Select Committee to Study Censure Charges Re Senator McCarthy of Wisconsin*, Senate Report No. 83-2508, November 8, 1954. Representative Adam Clayton Powell was "censured" for misconduct in 1969. H.R. Rep. No. 27, 90th Cong., 1st Session (1969).

standing to seek First Amendment review by the judiciary. See *Laird, supra,* 408 U.S. at p. 13, citing *Ex parte Levitt,* 302 U.S. 633, 634 (1937).

Moreover, the record in this case clearly demonstrates that the intent of the respondents in applying the Code of Ethics was to punish petitioner for her exercise of political speech to maintain the appearance of unified political opinion under the so-called "one voice" policy expressed in Section 1530 of the Code of Ethics. Dr. Bohlen, the College President, understood "good board practice" to be that once a decision is made by a majority of a seven-member board, dissenting members are obligated to refrain from publicly expressing an opinion contrary to the majority. (Aplt's 10th Cir. App., pp. 60-67.) Mr. Bauman testified that petitioner violated the ethics policy by publishing her ad opposing the tax increase. (Aplt's 10th Cir. App., p. 73.) Ms. Porter testified that, "Once the Board has voted on a question, it's very important that you speak as one." (Aplt's 10th Cir. App., p. 82.) Mr. Atwell testified that a board member agrees to give up her right to publicly oppose an action of the board once elected, or face censure. (Aplt's 10th Cir. App., p. 92.) Mr. Don Brown stated, under oath, that board members have to keep their misgivings to themselves, (Aplt's 10th Cir. App., pp. 96-97); while Ms. Jean Brown said that even if a member had personal problems with a majority decision, a Board member must publicly support it under the Code of Ethics. (Aplt's 10th Cir. App., p. 101.) Mr. Kaiser forthrightly testified that a trustee is prohibited from publicly stating she had changed her mind to oppose the tax increase, and that the Code of Ethics

lawfully "abridged" a trustee's right of free speech. (Aplt's 10th Cir. App., pp. 112 and 114.)

CONCLUSION

This matter involves a written code of conduct which, as applied, prohibits an elected official from exercising protected political speech under threat of public "censure" for violation of the Code of Ethics. Yet, because the sanction imposed was merely a public statement condemning petitioner for violating a code of ethics, implying a want of integrity, the Court of Appeals, citing *Laird, supra,* held that petitioner's right of free speech was not infringed because there was no "specific collateral injury" since damage to reputation is supposedly tolerated under *New York Times Co. v. Sullivan, supra.* To clarify whether *Laird* and *New York Times Co.* should be so interpreted to allow the application of a Code of Ethics to punish protected speech because such punishment merely stigmatizes the speaker's reputation, this Court should grant the Petition for Certiorari.

DATED this 23rd day of April, 2001.

Respectfully submitted,

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